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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

THE PROVISION OF INTERSTATE AND
INTERNATIONAL INTEREXCHANGE
TELECOMMUNICATIONS SERVICE VIA THE
"INTERNET" BY NON-TARIFFED, UNCERTIFIED
ENTITIES

AMERICA'S CARRIERS TELECOMMUNICATION
ASSOCIATION ("ACTA")
Petitioner

PETITION FOR DECLARATORY RULING,
SPECIAL RELIEF, AND
INSTITUTION OF RULEMAKING AGAINST:

VocalTec, Inc.; Internet Telephone
Company; Third Planet Publishing Inc.;
Camelot Corporation; Quarterdeck
Corporation; and Other Providers of Non-tariffed,
and Uncertified Interexchange Telecommunications
Services,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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Docket No. RM-8775

To the Commission:

REPLY COMMENTS
OF THE
NEW MEDIA COALITION FOR MARKETPLACE SOLUTIONS

Dated: June 10, 1996

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SUMMARY

In passing the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, (1996) (the "1996 Act"), Congress did not give the Federal Communications Commission ("FCC") jurisdiction over the Internet and its use. The entire thrust of the 1996 Act is to allow the marketplace to foster competition, enhance the development of new telecommunications technologies, and moderate the Commission's regulatory role. ACTA's Petition and Initial Comments run counter to the underlying purpose of the 1996 Act. Congress expressly intended to free the emerging competitive telecommunications marketplace from monopoly-era regulatory restraints. The 1996 Act's purpose is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. 1 (1996). The Act's primary purpose, therefore, is to foster and encourage competitive markets, such as those that are developing over the Internet.

Internet service is not, and does not fall under the 1996 Act's definitions of a common carrier service, telecommunications service, telecommunications carrier, or basic telephony type service. The Internet is neither customer premises equipment ("CPE") nor enhanced services. It can only be classified as an "information service" and should not be regulated under the provisions of the 1996 Act. Assuming that the FCC deemed the Internet an "enhanced service", the Commission has the authority to and should forbear from regulation.

ACTA ignores the overriding issue that the Internet is neither a monopolistic common carrier nor a scarce resource necessitating FCC regulation in order to protect the public interest. Historically, government regulation of the telephone and broadcasting industries has been justified by those respective underlying policy objectives. These justifications are inapplicable in the context of the Internet.

ACTA's Petition originally targeted companies that publish software for use on the Internet. ACTA has now apparently forsaken that position and has not included such arguments in its Initial Comments. In the original Petition, ACTA was not addressing communications, which is arguably a proper focus of the Commission, but rather makers of products that provide the form and content of a given communication. ACTA's abandonment of this position in its Initial Comments confirms that it must concede lack of FCC regulatory authority over Internet software publishers and hardware manufacturers.

For all the foregoing reasons, and those set forth in its Initial Comments, the New Media Coalition For Marketplace Solutions strongly urges the Commission to reject ACTA's request to regulate the Internet and Internet-related products.

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Docket No. RM-8775

To the Commission:

**REPLY COMMENTS
OF THE
NEW MEDIA COALITION FOR MARKETPLACE SOLUTIONS**

The Interactive Television Association's New Media Coalition for Marketplace Solutions ("New Media Coalition") hereby replies to the Initial Comments ("Initial Comments") of America's Carriers Telecommunications Association ("ACTA") and other parties arguing the

exercise of Federal Communications Commission ("FCC") jurisdiction over the Internet and its use.

ARGUMENT

New Media Coalition strongly opposes the Comments filed by America's Carriers Telecommunications Association ("ACTA"). In addition, New Media Coalition will respond to certain arguments of other filers.

A. The Commission Has No Authority To Regulate Use of the Internet Under the Communications Act Of 1934 or the Telecommunications Act of 1996 Because Internet Digital Voice Transmission Is Not A Telephone Service

1. Petitioner, in its Initial Comments, claims that voice communication services offered by Internet Service Providers ("ISPs") are basic telephone services and contends that the 1934 Act provides the Commission with explicit jurisdiction over the Internet and its use. On page 16 of the Initial Comments, ACTA contends that "not only are Internet telephone service providers ("ITSPs")¹ 'telecommunications carriers' under the broad definition of the new law, but they qualify as 'common carriers' under the Telecommunications Act of 1934." Initial Comments at 16.

2. There is no language in the 1934 Act to suggest that Congress intended the agency to regulate the use of a technology such as the Internet through the Act. Rather, Congress charged the FCC with regulating monopoly telephone service and common carriage (Title II) and allocating scarce and finite resources in the public interest (Title III). Such Commission

¹ This term, "ITSP", is an attempt by ACTA to mislabel Internet Service Providers (ISPs) and to mislead and confuse the Commission. This term is being used to broadly describe all on-line data transmission services offered by ISPs. ISPs offer a broad range of data services, including the ability of customers to use Internet digital voice transmission software.

regulation of telecommunications by wire and radio was necessary to avoid interference and ensure universal access.

3. ACTA's citation to *NARUC v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976) Initial Comments at 16-17) and the discussion therein does not require its extension to the Internet and its use. Congress, in enacting the 1996 Act, explicitly determined that "information services" such as Internet transmissions, including voice converted to data, constitute neither "common carrier" nor "telecommunications service". ("Telecommunications service" does not include information services." S. Rpt. No. 23, 104th Cong., 1st Sess. 18 (1995)).

4. "Common carrier" defines a person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign radio transmission of energy. Clearly, ISPs are not "common carriers", nor do they provide or qualify as a "telecommunications service". ISPs *do not* offer telecommunications services to the public for a fee. Rather, ISPs provide access to a interconnected computer network, where the consumer of the provided ISP on-line access can use a variety of computer services available to them. The Internet does not fall within these definitions, and therefore the FCC does not have the authority to use its scarce resource in order to regulate the Internet.

5. Internet Service Providers fail to meet the definition of a "telecommunications carrier" under the Act. Internet digital voice transmission is not, and cannot be defined as a "telecommunications service", and ISPs cannot be defined as a "carrier" for telecommunications purposes. Internet voice is not basic telephony. The term, used often to describe the act of "picking up the phone" and dialing another receiving party, does not and cannot include digital

voice transmissions. Therefore, the FCC has no authority under the definitions of the Act to regulate Internet data transmissions.

6. The new definition of "information services" in the 1996 Act eliminates any doubts about continued FCC jurisdiction, ancillary or otherwise, over computer data and information services. Section 153(a)(41), as added by the 1996 Act 47 U.S.C. § 153(a)(41) defines "information services" as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, *and includes electronic publishing*, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

The Internet falls squarely within the Commission's definition of "information services" and, as such, is clearly outside of the Commission's regulatory reach.²

7. Similarly, the Internet use that ACTA seeks to have regulated is not "basic" telephone service. (*Comments*, p.18). If anything, they are "enhanced services", even by the definition set forth in the Commission's existing rules. See 47 C.F.R. § 64.702(e) (cited by Initial Comments at 18). Clearly Internet software, whether designed to deal with voice or otherwise, acts on the subscribers' information by converting, in the case of voice, analog signals to digital data transmissions and back to analog voice at the receiving end.

² Congress made a specific finding in the 1996 Act that it is the policy of the United States:

"to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."

Pub. L. 104-104, Section 509, 110 Stat. 56, 138 codified at 47 U.S.C. § 230 (b)(2).

8. Internet data services use the Internet with shared data bases (e.g., AOL bulletin boards or audio-text information banks) or have their text transmissions converted by Internet protocols for eventual delivery at the receiving end of messages, including, for example, orders for merchandise. Thus, it is plainly evident that at most, Internet transmissions are enhanced services, which the Commission has specifically chosen to forbear from regulating.³ By the Commission's *Computer II* precedent, the FCC should not regulate information or enhanced services under Title II of the 1934 Act and the 1996 Act sets report side its regulatory purview.

9. The Commission's historic rationales for regulation under Title II and Title III of the 1934 Act also do not apply to the Internet because it is neither a scarce resource nor a monopoly service. Unlike radio and television broadcasters who must operate within a narrow bandwidth in order to avoid interference problems, there are no structural limitations on the amount of bandwidth that service providers can make available to users on the Internet. Nor does the monopoly justification apply in this era of exploding telecommunications competition, when the Commission is lifting its regulatory hand from common carrier services and the number of Internet access providers is multiplying rapidly.

10. ACTA's contention that current Internet services are not in the public's "best interest", because they constitute "free" long distance service that will undermine long distance telephone service providers, is misplaced. Long distance telephone services, utilized to transmit digitized voice over the Internet, is not "given away". Rather, the long distance cost associated with all Internet data transmissions is included in the monthly access fee which the personal

³ *Computer II, Final Decision*, 77 F.C.C. 2d 384, *mod. on recon.*, 84 F.C.C. 2d 50 (1980), *further mod. on recon.*, 88 F.C.C. 2d 512 (1981), *aff'd sub. nom. Computer and Communications Industry Association v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982). *cert. den.* 461 U.S. 938 (1983), *aff'd on second further recon.*, F.C.C. 84-190 (released May 4, 1984).

computer owner ("PC") and/or on-line service subscriber pays to ISPs. ISPs purchase long distance service from long distance carriers and recover this cost in the monthly access fees they charge to PC users. Indeed, an ISPs' transmission of a digitized voice transmission is no different than the transmission of an e-mail message.

11. ACTA's conclusory "public interest" arguments, which discuss historically different rationales for regulation of the telephone and broadcast media over which the Commission has traditionally asserted jurisdiction, do not justify regulation of the Internet and its use. In construing the intent of Congress in the 1934 Act and the 1996 Act, the Commission must take note of this different environment and not extend its jurisdictional reach to include the Internet.

12. The Internet use which ACTA challenges is not a "telecommunications service" as defined under the 1996 Act. Therefore, ACTA's argument, on pages 22-23 of its Initial Comments, that ISPs need to contribute to a universal service fund fails. ACTA concedes that this contribution requirement required by the 1996 Act is incumbent upon "telecommunications carriers". Initial Comments at 23. By the very definition cited by ACTA, Internet uses do not constitute "telecommunication service."

13. Furthermore, the ACTA Petition is not the proper vehicle for addressing or deciding the scope of the universal service requirement. The Commission has already initiated a completely separate rulemaking on that issue.⁴ Similarly, the ACTA Petition is not the proper context for addressing access charge reform, as suggested by some local exchange carriers ("LECs") and IXC's providing comments. *See, e.g.,* Comments by Pacific Bell and Nevada Bell,

⁴ *See: Notice of Proposed Rule Making and Order Establishing Joint Board, CC Docket No. 96-45, released March 8, 1996.*

p. 8, U.S.. West, p. 2; Sprint Corporation, p. 4. If the Commission believes this issue must be considered then it should do so as part of an overall effort at revamping the access charge mechanism, not here.

14. Significantly, ACTA appears to have stepped back from its request for special relief in the form of an injunctive order to stop certain Internet services. Petition at 7 n. 4. As New Media Coalition set forth in detail, in addition to lack of an jurisdictional basis, ACTA has made out no case to justify freezing the status quo. New Media Coalition Comments, pp. 14-15.

B. Internet Technological Advances Will Outpace FCC Regulations

15. Currently, new methods of Internet data transmission evolve daily. The potential uncertainties that would be created by a lengthy FCC rulemaking would unnecessarily stretch the Commission's limited resources and could stifle the development and availability of new technologies for Internet users.

16. FCC regulation of the Internet would deter and delay new technological advances because any new advances would require FCC approval. By the time the new technology would have been approved, it would have already been surpassed by a new, improved data system. Accordingly, rather than foster competition and advanced services as required by the 1996 Act, Commission regulation of software publishers and other information products used over the Internet would have precisely the opposite effect.

C. FCC Cannot Effectively Regulate Digitized Voice Data Transmissions

17. Digitized voice transmissions cannot be feasibly distinguished from e-mail transmissions, the data related to games or other types of data transmissions. Monitoring the Internet to achieve a method for regulating a digitized voice transmission surcharge would turn

the Commission into the world's largest surveillance agency, monitoring the content of millions of data transmissions. As noted by Microsoft, the Commission would effectively become the "bit police",⁵ a mission for which the agency has neither statutory charge nor financial resources. In addition, it would raise serious and substantial privacy concerns.

17. Some parties have asserted that the regulatory model for dealing with Internet and Internet related software and hardware is how the FCC handles customer premises equipment ("CPE") attached to the telephone network. CPE is unregulated in the same sense as an "enhanced service" for tariff purposes, but the FCC must pass on the potential for harm to the telephone network under Part 68 of its Rules.

18. However, FCC regulation of CPE could subject Internet software and hardware to a regulatory prohibition on digitized voice transmission over existing telephone carrier systems. Such potential regulation of CPE is clearly outside of the FCC's jurisdiction, and runs counter to the intent of Congress. It is far preferable that the FCC conclude that Internet and its service are not subject to FCC regulation.

**D. The Rapidly Evolving Internet Must Remain Free
Of Commission Interference To Allow The Free
Play Of Market Forces**

19. Congressional policy underlying the 1996 Act rejects the FCC regulation sought by ACTA. The 1996 Act promotes the continued development of the Internet and other interactive computer services; as well as the preservation of the vibrant and competitive free market that presently exists for the Internet and these other interactive computer service. *See* 47

⁵ *Opposition of Microsoft Corporation to ACTA Petition* at 7.

U.S.C. § 230 (b)(2), cited in footnote 2, *supra*. Regulation of such services on the Internet will lead to the restraint or possibly the elimination of free market competition on the Internet.

20. The FCC's regulation of such transmissions could lead to the imposition of substantial costs to ISPs and consumers. Regulation would undermine and hamper many small entrepreneurs whose technological advances have assisted the public in gaining access to the Internet. All of this would be directly contrary to the intent of Congress which is clearly reflected in the 1996 Act. In sum, by remaining free from FCC regulation, entrepreneurs and ISPs will continue to increase their competition for customers, keep the costs low for Internet users, develop new technology, and keep the Internet available to everyone, all as Congress envisioned.⁶

**E. Even If These Services Are Arguably Within
The Commission's Regulatory Group, It
Should Forbear**

21. Even if arguendo the Commission determines that it had jurisdiction to regulate the services which are the focus of ACTA's Petition, it has the statutory authority to and should forbear from regulation. Title IV of the 1996 Act gives it the authority to do so. *See* Section 401 of the 1996 Act, codified at 47 U.S.C. §160 (a). Such forbearance would be directly consistent with the goals of the 1996 Act, to promote competition and further technological development. Moreover, it would be fully consistent with the entire trend of the Commission's regulation of the interstate interexchange marketplace, where the FCC has recommended elimination of tariffs and other regulations.

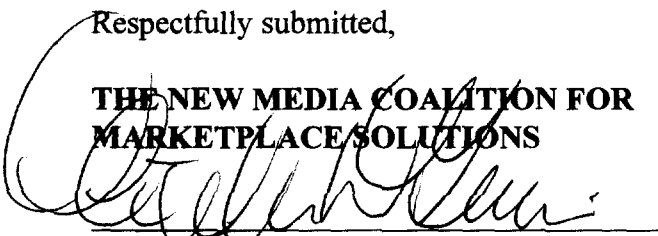
⁶ Section 706 of the 1996 Act in particular directs that regulators stimulate the timely deployment of advanced telecommunications services, not delay it. 47 U.S.C. § 157 note.

III. CONCLUSION

WHEREFORE, in light of the foregoing, as well as the arguments set forth in The Interactive Television Association's New Media Coalition for Marketplace Solutions' Initial Comments, the Commission should dismiss the ACTA Petition and deny the relief requested by ACTA.

Respectfully submitted,

**THE NEW MEDIA COALITION FOR
MARKETPLACE SOLUTIONS**

A large, stylized handwritten signature in black ink, likely belonging to Paul C. Besozzi, is written over the printed name and firm name.

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CERTIFICATE OF SERVICE

I, Lisa Y. Taylor, a secretary in the law offices of Patton Boggs, L.L.P. do hereby state and affirm that copies of the foregoing "**Reply Comments Of The New Media Coalition For Marketplace Solutions**", was served in the manner indicated, this 10th day of June 1996, on the following:

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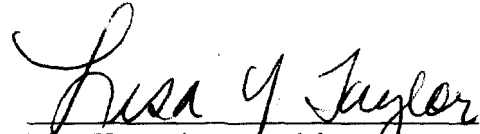
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